

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 18 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0220-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BRAD LEE MONTGOMERY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400137

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Brad L. Montgomery

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Brad Montgomery was convicted after a jury trial of one count of kidnapping and two counts of sexual assault. The trial court sentenced him to a combination of prison terms totaling forty-two years. He appealed and, although we affirmed the convictions, we vacated the prison term on the kidnapping offense and

remanded the matter for resentencing. *State v. Montgomery*, No. 2 CA-CR 2005-0016 (memorandum decision filed Feb. 15, 2007). Montgomery filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief, and this petition for review followed. Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 On review, Montgomery challenges the trial court's rejection of his claim of newly discovered evidence. The claim was based on the affidavits of two jurors. One juror, D.L., stated in her October 26, 2004, affidavit that the verdict did not reflect her true sentiments. She said she had felt intimidated by another juror, K.B., who was a probation officer, and "had belittled everything everyone else said and was very pushy"; therefore, she stated, she felt coerced into rendering a guilty verdict. Another juror, W.C., stated in his October 21, 2004, affidavit that he had been pressured into voting guilty because of health issues, explaining he had needed rest and had known that the sooner he voted guilty the sooner the deliberations would come to an end. In a previous letter to Montgomery, referred to in his initial motion for new trial, W.C. stated the verdict did not reflect his sentiments.

¶3 The affidavits had been presented to the trial court as supplements to Montgomery's renewed motion for new trial. On appeal, this court did not address the challenge to the trial court's denial of the renewed motion for new trial, however, because it was untimely; as we stated, because the trial court lacked jurisdiction to address the motion we would not address it. *Montgomery*, No. 2 CA-CR 2005-0016, ¶ 5. Nor did

we address the trial court's ruling on the initial motion for a new trial because appellate counsel had not argued the court had abused its discretion in denying it. *Id.* ¶ 6.

¶4 In rejecting Montgomery's claims of newly discovered evidence and ineffective assistance of counsel related to the affidavits of the two jurors, the trial court correctly found the affidavits were not an appropriate basis for a motion for new trial pursuant to Rule 24.1(d), Ariz. R. Crim. P. Therefore, the court correctly found Montgomery did not establish a viable claim of ineffective assistance of counsel because he was not prejudiced by the untimeliness of the renewal of the motion for new trial. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984) (to establish colorable claim of ineffective assistance of counsel defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial).

¶5 Similarly, the trial court correctly found the affidavits did not constitute newly discovered material facts as contemplated by Rule 32.1(e), Ariz. R. Crim. P., because the information contained in them had been known at least by the time of the renewed motion for new trial. Indeed, one juror's sentiments had been raised in the first motion for new trial. Moreover, as the trial court properly noted, the jurors had answered in the affirmative when the trial court had asked them if the verdicts reached had been their true and correct verdicts. And, a defendant is not entitled to relief based on affidavits such as these relating to the subjective mental processes of the jurors. *See Ariz. R. Crim. P. 24.1(d); see also State v. Covington*, 136 Ariz. 393, 396-97, 666 P.2d 493, 496-97 (App. 1983).

¶6 On review, Montgomery has not persuaded us the trial court abused its discretion in rejecting the claim of newly discovered evidence or the related claim of

ineffective assistance of counsel. Specifically, he has not persuaded us that the court should have considered juror D.L.’s assertion she had felt coerced by K.B. as a claim of juror misconduct. Although D.L. stated in her affidavit she had felt intimidated by K.B., she did not allege any actual misconduct that would have entitled Montgomery to relief. That K.B. may have been “pushy” or overly confident is not misconduct.

¶7 Montgomery suggests that more extensive questioning of K.B. would have revealed the extent of her law enforcement background and would have bolstered his argument that she had intimidated D.L.; however, he does not appear to be challenging the trial court’s rejection of his claim that trial counsel had been ineffective during voir dire in this regard. Nevertheless, Montgomery has still failed to persuade this court that misconduct occurred or that further questioning of K.B. during voir dire would have either made his motion for new trial stronger or, more importantly, would have compelled the trial court to grant it.

¶8 We grant Montgomery’s petition for review. But for the reasons stated, we deny relief.

/s/

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/

PHILIP G. ESPINOSA, Presiding Judge

/s/

VIRGINIA C. KELLY, Judge